Supreme Court, U.S.
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No. 98-775

In The

Supreme Court of the United States

October Term, 1998

GORDON MILLER,

Petitioner,

v.

FRED VANNATTA, GEORGE BOEHNKE, AND CENTER TO PROTECT FREE SPEECH, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The second question presented for review should be as follows:

> 2. Whether the Ninth Circuit correctly held that § 22 (Measure 6) is not closely drawn to promote the state's interest in preventing political corruption or the appearance thereof.

Petitioner's second question incorrectly states that the Ninth Circuit "held that the only corruption of its electoral process that empowers a state to impose restrictions on the making of campaign contributions is corruption that flows from contributions that are explicitly made in exchange for demonstrated political favors." Pet. i.

The Ninth Circuit did not so hold. Petitioner's description of the holding as limiting the state's interest to the prevention of "corruption that flows from contributions that are explicitly made in exchange for demonstrated political favors" uses language that neither appears in the opinion nor accurately describes the court's holding. The opinion contains a reference to the state's interest as preventing quid pro quo corruption, *see* 151 F.3d at 1221. However, the opinion neither expressly nor impliedly *limits* its scrutiny to the prevention of quid pro quo corruption and it expressly incorporates the reasoning of the District Court, 151 F.3d at 1221, in which that court clearly recognized a protectable interest in preventing the *appearance* of corruption. *See* Pet., App. 43.

PARTIES

The Center to Protect Free Speech, Inc. has no parent or subsidiary corporations.

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STATEMENT OF THE CASE

The petition accurately describes the course of the litigation and the decision of the Ninth Circuit Court of Appeals. It also accurately describes the enactment of Measure 6. The remainder of petitioner's statement is either argument or factual recitals not material to the consideration of the questions presented.

SUMMARY OF ARGUMENT

Petitioner lacks standing. He fails to show an actual and imminent invasion of a legally protected interest that is concrete and particularized. His generalized interests are shared with the public at large.

Measure 6 is not closely drawn to promote the state's interest in corruption or the appearance thereof. This is true even under the less onerous "rigorous" level of scrutiny applied by the Ninth Circuit. The measure is not closely drawn to promote the state's interest in corruption or the appearance thereof because it bans all out-of-district contributions, regardless of size or any other factor that would tend to suggest corruption.

The law does not recognize an interest in preserving a republican form of government that is sufficiently important to justify restraints on freedom of speech and association. The record does not show any commitment by the State of Oregon to such an interest.

Even if there is an interest in a republican form of government sufficient to justify some form of restraint on freedoms of speech and association, Measure 6 is not

such a restraint. It is over-broad; it prohibits contributions so small as to have no potential for infringing upon the state's interest in a republican form of government.

ARGUMENT

A. PETITIONER LACKS STANDING.

The State of Oregon has declined to petition this court for review of the decision of the Ninth Circuit. Petitioner lacks standing to do so.

This court has recently reiterated the basic principle that standing requires "an invasion of a legally protected interest" that is "concrete and particularized" and "actual and imminent." "An interest shared generally with the public at large in the proper application of the constitution and laws will not do." *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1067 (1997).

Petitioner anticipates this challenge at Pet. 11, n. 1. There he claims standing based on "his status as a voter and as a former and future candidate." But, his interest as a voter is clearly not particularized; it is shared with a major proportion of the public at large. His interest as a former candidate is neither concrete, actual nor imminent. His interest as a future candidate is likewise neither concrete, actual nor imminent.

Petitioner cites *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), but that case held only that "at least some of the appellants," unspecified, had standing, and those appellants included two candidates, three political parties

and a potential contributor. Petitioner does not show that he is any of those.

Petitioner cites *FEC v. Akins*, 118 S.Ct. 1777 (1998), but the court therein found an actual "injury in fact" in the FEC's dismissal of the petitioners' complaint. 118 S.Ct. at 1780.

Petitioner cites cases holding that a campaign contributor has standing to challenge the constitutionality of campaign finance laws. Petitioner does not show that he is a contributor or even a potential contributor.

B. MEASURE 6 IS NOT CLOSELY DRAWN TO PROMOTE THE STATE'S INTEREST IN CORRUPTION OR THE APPEARANCE THEREOF.

1. The Level of Scrutiny.

The Ninth Circuit herein applied "rigorous, rather than strict scrutiny, to Measure 6," 151 F.3d at 1221, requiring it to be "closely drawn to advance a sufficiently important interest." *Id.*

Appellees contended below and this petitioner conceded that strict scrutiny was applicable. However, the measure fails under rigorous scrutiny and respondent will discuss it in those terms.

2. The Measure is Not Closely Drawn.

The Ninth Circuit held that "Measure 6 still fails to pass scrutiny for the reasons stated by the District Court." 151 F.3d 1221. The District Court's reasoning is

set forth at App. 43-45 to the petition. The Ninth Circuit found "equally applicable here" the rationale of *Service Employees Int'l Union, AFLCIO v. Fair Political Practices Comm'n*, 955 F.2d 1312 (1992) which struck down a California initiative that "did not distinguish on the basis of size of donation." As the Ninth Circuit stated, "Measure 6 bans all out of district donations, regardless of size or any other factor that would tend to indicate corruption." 151 F.3d at 1221.

That reasoning, adopted unanimously by the Ninth Circuit panel, is sound. As appellees argued below, the measure as drafted would prohibit a mother outside the district from contributing a dollar to her candidate son, while permitting an in-district contributor with a clear vested interest to entirely finance the candidate's campaign (Oregon has no limits on contribution amounts).

C. THERE IS NO RECOGNIZED STATE INTEREST IN PRESERVING A REPUBLICAN FORM OF GOVERNMENT.

Petitioner contends, and the dissent found, that Measure 6 is appropriate to protect the state's interest in a republican form of government, which petitioner and the dissent describe as a form of government whereby the Legislature is composed of representatives elected from separate political subdivisions of the state. Oregon elects its legislators in that fashion.

No case has ever held that a state's interest in its republican form of government is a "sufficiently important interest" justifying limitations on freedoms of speech

and association. Neither petitioner nor the dissent cites any such case.

Petitioner cites Article IV, § 4 of the United States Constitution, which requires the federal government to "guarantee to every State in the Union a Republican Form of Government." But, of course, the Constitution here speaks only to the federal government. It does not require any state to adopt or preserve a republican form of government.[1]

The record herein does not show that the State of Oregon demonstrated any interest in a republican form of government. Even if it has such an interest, it is doubtful whether the state's interest in a republican form of government is "sufficiently important" to justify any sort of restraint. Oregon has demonstrated a limited commitment to any such interest by enacting initiative and referendum laws. Oregon Constitution Article IV, § 1, provides that the legislative power of the state is vested in the Legislature "except for the initiative and referendum powers reserved to the people" and sets forth a voting scheme whereby all electors of the state may vote on statewide measures irrespective of the districts in which they reside. Measure 6 was enacted by that process.

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[1] This court has held that questions under Article IV, § 4 are political, not judicial, and "it rests with the Congress to decide what government is the established one in a state . . . as well as its republican character." *Luther v. Borden*, 7 How. 1 (1849). *See also Pacific States Tel. and Tel. v. Oregon*, 223 U.S. 118 (1912) (court refused to consider whether the adoption of the initiative and referendum violated Article IV § 4).

D. THE MEASURE IS NOT CLOSELY DRAWN TO PROMOTE ANY STATE INTEREST IN A REPUBLICAN FORM OF GOVERNMENT.

The crux of the dissent's argument is this:

> Measure 6 is over-inclusive in that it prohibits donations which will have no influence.
>
> The state's interest, however, is more appropriately characterized as ensuring that only those who are constituents participate in the electoral process. Toward that end, Measure 6 is not over-inclusive in that it prohibits every non-district resident, but no residents, from participating in the electoral process.

151 F.3d at 1223-4.

Thus, the dissent recognizes what this court must find in order to uphold Measure 6: it must find that the state's interest in limiting participation in district elections is sufficiently important to justify prohibiting even innocuous forms of participation that "have no influence."

That places too high a value on the asserted interest, and invites further restraints.

Again, Measure 6 would prohibit an out-of-district contribution irrespective of the size of the contribution. Nowhere in the record is there any basis for concluding that a modest contribution, one having no influence on the outcome of an election, could prejudice the state's interest in a republican form of government. Thus, even if there is a protectable interest in a republican form of government, the measure is not closely drawn to promote that interest.

E. THE WRIT SHOULD NOT BE ALLOWED.

This case could add nothing of significance to the jurisprudence in this field of law.

The only apparently novel question presented is the issue of a protectable interest in a republican form of government. However, that issue is not well presented here. The principal problem is that the restraint is patently over-broad. It clearly goes far beyond what is appropriate to protect the state's republican form of government.

If the court were to uphold Measure 6 as appropriate to protecting the state's interest in a republican form of government, even though it prohibits participation that has "no influence," then the decision would attach such an importance to that interest that more restraints on speech and association would be invited. On the other hand, if the court were to recognize a protectable interest in a republican form of government and then strike down this particular measure as over-broad, the states would be left with no guidance as to what sort of restraints might be justified to protect that interest.

The question would be better addressed if and when the court is presented with a conflict in the circuits, or a case in which a state seeks to protect its republican form of government by restraints that are at least arguably closely drawn.

CONCLUSION

The petition should be denied.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

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December 11, 1998